79

(2)

No. 07-703

FILED
DEC 2 6 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

JAMES DWIGHT PAVATT,

Petitioner,

vs.

THE STATE OF OKLAHOMA,

Respondent.

On Petition For Writ Of Certiorari To The Oklahoma Court Of Criminal Appeals

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

W.A. DREW EDMONDSON
Attorney General of Oklahoma

SETH S. BRANHAM*
Assistant Attorney General

313 N.E. 21st Street
Oklahoma City, OK 73105
(405) 521-3921 (Voice)
(405) 522-4534 (Fax)

Attorneys for Respondent
** Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342 2831

CAPITAL CASE
QUESTIONS PRESENTED

1. Whether the Oklahoma Court of Criminal Appeals violated Petitioner's constitutional right to present a complete defense grounded in the Due Process and Confrontation Clauses of the United States Constitution when it excluded evidence regarding the letter sent to defense counsel and the trial court from another individual who confessed to the murder to which Petitioner was charged?

2. Is prejudice implicit when a trial court improperly excludes evidence that a third party committed the crime rather than the defendant?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	5
PETITIONER FAILS TO PRESENT A COMPELLING, UNRESOLVED CONSTITUTIONAL ISSUE OF NATIONAL SIGNIFICANCE WARRANTING REVIEW BY THIS COURT	6
CONCLUSION	11

TABLE OF AUTHORITIES

Page

FEDERAL CASES CITED

Chambers v. Mississippi, 410 U.S. 284 (1973) 7, 9

Holmes v. South Carolina, 547 U.S. 319 (2006).....6, 7, 8, 9

Montana v. Egelhoff, 518 U.S. 37 (1996) 9, 10

FEDERAL RULES CITED

Rules of the Supreme Court of the United States, Rule 10 6

STATE CASES CITED

Gore v. State, 2005 OK CR 14, 119 P.3d 1298.....10

Pavatt v. State, 2007 OK CR 19, 159 P.3d 272 .....1, 2, 7, 8, 9

Primeaux v. State, 2004 OK CR 16, 88 P.3d 893 7

STATE STATUTES CITED

Okla. Stat. tit. 12, § 2804 .....7, 8

Okla. Stat. tit. 21, § 701.12 1

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent respectfully urges this Court to deny the petition for a writ of certiorari to review the published opinion of the Oklahoma Court of Criminal Appeals (OCCA), entered May 8, 2007. *Pavatt v. State*, 2007 OK CR 19, 159 P.3d 272 (Pet. App. 1-62).

STATEMENT OF THE CASE

Petitioner is currently incarcerated pursuant to a Judgment and Sentence entered in the District Court of Oklahoma County, State of Oklahoma, Case No. CF-2001-6189, for the first degree malice murder of, and conspiracy to murder, Rob Andrew. Petitioner was sentenced to death by a jury based upon its finding of the statutory aggravating circumstances that: (1) the murder was especially heinous, atrocious or cruel; and (2) the murder was committed for remuneration or the promise of remuneration. Okla. Stat. tit. 21, § 701.12. The OCCA subsequently affirmed Petitioner's convictions and death sentence on direct review. Petitioner's original application for state post-conviction relief remains pending with the OCCA in Case No. PCD-2004-25.

The State incorporates here by reference the statement of facts for Petitioner's case set forth by the OCCA on direct review, *Pavatt*, 2007 OK CR 19, ¶¶ 2-12, 159 P.3d at 276-78, and its discussion of the sufficiency of the evidence supporting his convictions.

Id., 2007 OK CR 19, ¶¶ 37-38, 159 P.3d at 285. To summarize, Petitioner and Brenda Andrew gunned down Brenda's husband, Rob Andrew, in the garage of the Andrew residence on November 20, 2001. The murder occurred during a bitter divorce battle initiated by Brenda several months earlier as well as an on-going extra-marital affair between Petitioner and Brenda. In late October 2001, Petitioner told his daughter that Brenda asked him to kill the victim. Petitioner and Brenda's first attempt, several days later, involved cutting the brake lines on the victim's car and luring him onto an interstate highway. Brenda was obsessed during this time period with obtaining ownership of an $800,000 life insurance policy on the victim's life owned by the victim. Petitioner, a Prudential insurance agent, sold this policy to the victim. The jury heard hours of recorded phone conversations between Petitioner, Brenda and Prudential Insurance customer service representatives in which Petitioner and Brenda falsely attempted to convince the company that Brenda was the true owner of the life insurance policy. Petitioner and Brenda forged the victim's signature on a backdated change-of-ownership form in an attempt to bolster Brenda's claim to the policy. When the victim spoke with Petitioner's supervisor at the insurance company concerning these actions, Petitioner became very angry and threatened to harm the victim for putting his job in jeopardy.

On the evening of November 20, 2001, the victim appeared at the Andrew residence to pick-up his

children for the Thanksgiving holiday. A short time later, Rob was dead, having been shot twice with a 16-gauge shotgun at close range in the garage while attempting to light a hot water heater. Brenda, on the other hand, had a superficial gunshot wound to her arm made with a .22 caliber pistol (Petitioner purchased a .22 caliber pistol at a local gun store the week before the murder). Brenda summoned 911 and described how two intruders shot both her and the victim. She gave few details about the purported intruders. Police discovered the Andrew children in the bedroom of the residence furthest from the garage where the murder happened. The door to this room was closed and the television was blaring at full volume. One of the Andrew children was asleep on the bed and the other was watching television. Brenda's behavior was described by several witnesses with experience dealing with people in traumatic situations as uncharacteristically calm for a woman whose husband has just been gunned down. Brenda was seen the next day chatting giddily with Petitioner at a hospital.

Although the murder weapon was never recovered, police discovered a spent .16 gauge shotgun shell, along with assorted .22 caliber ammunition, in the upstairs bedroom and attic of the next-door neighbor's residence. Brenda was house sitting for these neighbors when the murder occurred and no forced entry was observed. Ballistics showed that the 16-gauge shell found at the neighbor's house was fired from the same gun as the spent 16-gauge shell

found at the crime scene. Additionally, the victim's 16-gauge shotgun was missing from the Andrew residence when police searched it. This is significant because the victim told several people prior to the murder that Brenda would not let him take that shotgun when he moved out of the house. The day after the murder, Petitioner returned his daughter's car which contained a .22 caliber bullet on the floorboard. In a conversation later that day, Petitioner told his daughter never to repeat that Brenda had asked him to kill the victim, and he threatened to kill his daughter if she did.

In the days following the murder, Petitioner and Brenda fled to Mexico with the Andrew children instead of attending the victim's funeral. Prior to leaving the United States, Petitioner and Brenda asked Petitioner's daughter to help them create a document bearing the victim's forged signature granting permission for the Andrew children to enter Mexico with Brenda. Brenda also asked Petitioner's daughter to transfer funds from her bank account. Petitioner called his daughter several times from Mexico, demanding that she send money. Petitioner and Brenda were arrested after re-entering the United States with the Andrew children in late February 2002 at the Texas-Mexico border. The State introduced at trial a letter written by Petitioner in which he claimed that he committed the murder with another man but that Brenda had nothing to do with the murder. *Id.*

REASONS FOR DENYING THE WRIT

Petitioner advances no compelling reason to grant certiorari. Petitioner presents no conflict in federal constitutional precedent warranting resolution by this Court. Nor does Petitioner develop a compelling federal constitutional issue arising from the OCCA's opinion warranting certiorari. Rather, he seeks supervisory review of his claim that he was entitled to present evidence that Zjaiton Wood, a fellow inmate at the county jail who was facing unrelated capital murder charges, confessed to the murder and exculpated Petitioner. The instant case therefore presents no compelling issue of national significance warranting resolution by this Court.

Further, Petitioner's claim is substantively meritless because, *inter alia*, Wood's purported version of events was inconsistent with a key aspect of the physical evidence found by investigators at the crime scene. Most notably, the statement in Wood's purported letters that he left the 16-gauge shotgun used to murder the victim in the garage at the crime scene was contradicted by the fact that the murder weapon was never recovered by police and remains missing to this day. Further, Wood's purported version of events is inconsistent with both Petitioner's and Brenda Andrew's separate statements that two people perpetrated the murder. These and other facts established that Wood's version of events, contained in the letters he supposedly wrote, was demonstrably false and totally lacking in trustworthiness.

PETITIONER FAILS TO PRESENT A COMPELLING, UNRESOLVED CONSTITUTIONAL ISSUE OF NATIONAL SIGNIFICANCE WARRANTING REVIEW BY THIS COURT.

Petitioner contends that certiorari is warranted because the OCCA incorrectly resolved his claim that he was denied his constitutional right to present a defense when the trial court disallowed defense evidence that Zjaiton Wood, a fellow inmate at the county jail, allegedly confessed that he alone murdered the victim. Pet. at 4-6. However, Petitioner provides no compelling reason why this Court should exercise jurisdiction over his case. Petitioner fails to develop any compelling federal question, or conflict in federal law, requiring resolution by this Court. Petitioner essentially asks this Court to engage in error-correction review to remedy alleged deficiencies in the OCCA's merits analysis of his third-party perpetrator claim. Such is an inadequate basis for certiorari review. Rule 10, *Rules of the Supreme Court of the United States*.

Petitioner fails to present any justification for certiorari review beyond comparison of his case to *Holmes v. South Carolina*, 547 U.S. 319 (2006). Petitioner argues that "*Holmes* appears to hold that exclusion of [third-party perpetrator] evidence is always prejudicial" and urges that "[t]his Court should thus grant certiorari and answer the question of where [sic] exclusion of third-party evidence can ever be harmless." Pet. at 5. Petitioner further

contends that the OCCA did not take *Holmes* into account in finding exclusion of his proposed evidence harmless error. Pet. at 6. The OCCA, however, specifically addressed *Holmes* and distinguished it from Petitioner's case. *Pavatt*, 2007 OK CR 19, ¶¶ 49-53, 159 P.3d at 288-89. Moreover, the OCCA did not find error in the trial court's disallowance of Petitioner's third-party perpetrator evidence. Rather, the OCCA found that the trial court did not abuse its discretion under Okla. Stat. tit. 12, § 2804(B)(3) (Supp. 2002) – Oklahoma's evidentiary provision governing admission of statements against penal interest by a declarant which exonerate a charged defendant – by disallowing Petitioner's proposed evidence. *Id.*, 2007 OK CR 19, ¶¶ 45-46, 52-53, 159 P.3d at 287, 289.

The OCCA's finding of non-error is wholly consistent with this Court's decisions. *Holmes* made clear that: (1) the States may establish rules excluding evidence from criminal trials so long as those rules were not arbitrarily applied or disproportionate to the purposes they are designed to serve; and (2) well-established rules of evidence may constitutionally permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury. *Holmes*, 547 U.S. at 324-26. Thus, nothing in *Holmes* undermined the States' legitimate "interest in preventing wholly unreliable and possibly perjured evidence from being introduced at trial." *Primeaux v. State*, 2004 OK CR 16, ¶ 53, 88 P.3d 893, 904 (citing *Chambers v. Mississippi*, 410 U.S. 284

(1973)). The OCCA correctly recognized here that § 2804(B)(3) "is nothing like the rule invalidated in *Holmes*" because it permits the reliability of hearsay statements to be judged by any relevant evidence presented to the trial court on the preliminary question of admissibility. *Pavatt*, 2007 OK CR 19, ¶ 52, 159 P.3d at 289.

Petitioner's case is a far cry from *Holmes*, where admissibility of third-party perpetrator evidence hinged *solely* on the strength of the State's case establishing the accused's guilt:

> Under [the South Carolina rule in *Holmes*], the trial judge does not focus on the probative value or the potential adverse effects of admitting the defense evidence of third-party guilt. Instead, the critical inquiry concerns the strength of the prosecution's case: If the prosecution's case is strong enough, the evidence of third-party guilt is excluded even if that evidence, if viewed independently, would have great probative value and even if it would not pose an undue risk of harassment, prejudice, or confusion of the issues.

Holmes, 547 U.S. at 328-29. In the instant case, Petitioner's third-party perpetrator evidence was disallowed because it was deemed inherently unreliable. Zjaiton Wood, the source of Petitioner's third-party perpetrator evidence, was housed in the same pod as Petitioner at the county jail and was himself awaiting trial on capital murder charges in an unrelated case. Wood's purported letters were mailed

shortly after Petitioner's trial had begun and after the State had publicly outlined salient features of the case. Moreover, Wood's purported version of events was foreclosed by, *inter alia*, the physical evidence found at the crime scene. While Wood's purported letters claimed that the 16-gauge shotgun used to kill the victim was left at the crime scene, the murder weapon was never found. It is also significant that Wood's purported version of events, in which he claims sole responsibility for the murder, is inconsistent with the version of events relayed by Brenda Andrew to police that two men attacked her and her husband and Petitioner's statements in his handwritten letter that he enlisted another man to help him kill the victim. *Pavatt*, 2007 OK CR 19, ¶¶ 47-48, 159 P.3d at 287-88. Wood's own attorney agreed that the version of events portrayed in Wood's purported letters was not credible in light of the evidence presented at trial (Tr. XIII-B 11-12, 16).

The lower court correctly considered the total evidentiary picture surrounding Petitioner's proposed evidence in ruling on its admissibility. *Holmes* is therefore inapposite and Petitioner's invocation of that case as a basis for certiorari is of no consequence. The same is true of his passing reference to *Chambers v. Mississippi*, 410 U.S. 284 (1973), itself "an exercise in highly case-specific error correction." *Montana v. Egelhoff*, 518 U.S. 37, 52 (1996) (plurality opinion). The holding of *Chambers* "is certainly not that a defendant is denied 'a fair opportunity to defend against the State's accusations' whenever 'critical

evidence' favorable to him is excluded, but rather that erroneous evidentiary rulings can, in combination, rise to the level of a due process violation." *Id.* at 53. Here, no due process violation arises because of the totally unreliable nature of Petitioner's third-party perpetrator evidence. The fact-intensive basis supporting the state court's rejection of Petitioner's completely unreliable defense evidence is what he asks this Court to review, not a compelling, unresolved constitutional question of national significance. His citation of an alleged conflict between the OCCA's decision in this case and *Gore v. State*, 2005 OK CR 14, 119 P.3d 1298, another *state* case, as a basis for certiorari only confirms this fact. Pet. at 6.

Petitioner's claim that defense counsel "had an answer for every argument set forth by the [prosecution]" and "presented a masterful explanation . . . against the State's specific allegations" further confirms that the instant petition amounts to little more than a request for highly case-specific error correction review. Pet. at 5. Whether Petitioner's defense did or did not answer the prosecution's arguments was ultimately for the jury to decide based on the evidence presented. Considering the jury's verdicts after this highly fact-intensive analysis, however, it would appear that Petitioner overstates the defense actually presented to his jury. Moreover, Petitioner fails to relate his third-party perpetrator evidence to the "masterful" defense presented or otherwise show how it would "complete" his defense. This is significant considering the voluminous nature of the trial record

in this case which consists of thousands of pages of testimony and hundreds of exhibits. All things considered, Petitioner fails to present anything resembling a compelling constitutional question of national significance. Certiorari should therefore be denied.

CONCLUSION

For the reasons set forth above, Respondent respectfully requests this Court deny the petition for writ of certiorari.

Respectfully submitted,

W.A. DREW EDMONDSON
Attorney General of Oklahoma

SETH S. BRANHAM*
Assistant Attorney General

313 N.E. 21st Street
Oklahoma City, OK 73105
(405) 521-3921 (Voice)
(405) 522-4534 (Fax)

Attorneys for Respondent
** Counsel of Record*